LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
MAY 21 1958
JOHN T. FEY, Clerk

No. 14.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and Constituting the National Labor Relations Board, *Petitioners*

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, A Voluntary Unincorporated Labor Organization, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF ENGINEERS JOINT COUNCIL AS AMICUS CURIAE

GERARD D. REILLY
JOSEPH C. WELLS
Attorneys for Amicus Curiae

Of Counsel

REILLY, WELLS & RHODES
1120 Tower Building
Washington 5, D. C.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
(a) The Board's Disputed Unit Finding	2
(b) The District Court Injunction	3
(c) The Decision of the Court of Appeals	4
INTEREST OF ENGINEERS JOINT COUNCIL	5
SUMMARY OF ARGUMENT	9
ARGUMENT	11
1. The Unit Finding of the Board Expressly Departed From the Requirements of the Statute	11
2. Agency Action in Violation of Statute Confers Jurisdiction on District Courts	17
(a) Representation Proceedings Are Immune from Judicial Scrutiny Only Where Challenge to Agency Is Directed to Issues in Which Agency Is Vested With Discretion	17
(b) Congress Did Not Intend to Preclude Judicial Relief Where Review Provided by Section 10 Was Inadequate	20
(c) Such Review as Section 10 Provides Would Afford No Relief to Respondent	24
CONCLUSION	27

CITATIONS

CASES:

American Federation of Labor v. NLRB, 308 U.S. 401, 409-11	20, 21
Bate Refrigerator Co. v. Salzberger, 157 U.S. 1	14
Boeing Airplane Co., 86 NLRB 368	14
Continental Motors Corp., 77 NLRB 345	13, 16
Farmer v. United Electrical, Radio & Machine Workers, 211 F. 2d 36, cert. den. 347 U.S. 943	9

Page

Federal Telecommunications Laboratories, Inc., 92 NLRB 1395 14
Harmon v. Brucker, —U.S. —, decided March 3, 1958, 26 LW 4166-67 9
Inland Empire Dist. Council v. Millis, 325 U.S. 697 ..... 21, 22, 23
International Maritime Union v. Herzog, 334 U.S. 854 26
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 9
Leedom v. International Mine, Mill & Smelter Workers, 352 U.S. 145 ..... 9, 26
Leedom v. Kyne, 249 F. 2d 490, 491 12
Mueller Brass Co. v. N.L.R.B., 86 U.S. App. D.C. 153, 180 F. 2d 402 19
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 ..... 20, 24
N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292 26
Norris, Inc. v. N.L.R.B., 85 U.S. App. D.C. 106, 177 F. 2d 26 21
Peters v. Hobby, 349 U.S. 331 9
Red Canyon Sheet Co. v. Ickes, 98 F. 2d 308 (CADC) 14
Schwartz Laboratories, Inc., 89 NLRB 930 14
Service v. Dulles, 354 U.S. 363 9
Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943) 4, 10, 17, 19, 21, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 633

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and Constituting the National Labor Relations Board, *Petitioners*

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, A Voluntary Unincorporated Labor Organization, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF ENGINEERS JOINT COUNCIL AS AMICUS CURIAE

The Engineers Joint Council, with the consent of both parties in accordance with Rule 42(2), submits this brief amicus curiae to the Court in the genuine belief that it will aid the Court in the resolution of some of the questions presented by this case.

STATEMENT OF THE CASE

This case is before the Court on writ of certiorari to a decision of the Court of Appeals for the District of Columbia Circuit. The decision challenged by the National Labor Relations Board, petitioner in this case, affirmed a decree entered by Judge Matthews in the United States District Court requiring the Board to set aside a certification issued to a labor organization, respondent here. The decree further required the Board to conduct the representation election petitioned for by respondent in accordance with the statutory limitation prescribed by Section 9(b)(1) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. Sec. 151, et seq.,) referred to herein as "the Act".

(a) The Board's Disputed Unit Finding

The decree of the District Court, whose jurisdiction is contested here, was directed at a certification resulting from a Decision and Direction of Election of the Board, dated May 28, 1956 (R. 11). Although respondent union had petitioned for a unit confined to professional employees in the Buffalo plant of Westinghouse Electric Corporation, the Board found that a larger unit was appropriate for collective bargaining within the meaning of Section 9(b) of the Act (R. 16-17). In enlarging the unit described in the petition, the Board included three employee classifications which were found by the Board itself to be non-professional (R. 16) and ordered an election over respondent's objections, in which employees in these classifications were permitted to vote. In the subsequent election, a majority of the employees voted for respondent union (R. 22) which was then certified as the rep-

resentative of a unit of employees coextensive with the unit found appropriate in the disputed Direction of Election (R. 19-20).

Subsection 9(b) of the Act, which gives the Board authority to "decide in each case . . . the unit appropriate for the purposes of collective bargaining" contains three limiting provisos.[1] One of these limitations, drawn to the attention of the Board in the administrative proceedings by respondent union, reads as follows:

> ". . . *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees, and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; . . ."

Notwithstanding, the Board even prior to any vote by the professional employees, placed the three admittedly non-professional classifications in the proposed bargaining unit on the ground that these employees shared a "close community of employment interests" with the professionals (R. 16).

(b) The District Court Injunction

After certification the respondent union filed a complaint for an injunction in the District of Columbia seeking to compel the members of the Board to set aside the direction of election, vacate the certification, and to refrain from processing the union's original petition except in accord with the limitations placed upon the authority of the Board by Section 9(b) (1).

---

[1] The entire text of this subsection appears at pp. 40-41 of petitioner's brief.

The matter was heard on the Government's motion for dismissal or summary judgment and on the union's cross motion for summary judgment (R. 31). Thereafter the Court issued a decree, dated December 19, 1956, in which it granted the relief sought by respondent union and further ordered that the election petition be processed in such a way that the voting unit should not include both professional and non-professional employees (R. 32).

In its appeal the Board, although not expressly conceding error in the inclusion of non-professional employees in a professional bargaining unit, nevertheless did not challenge the holding of Judge Matthews that the Board disregarded the statutory limitations upon its authority in making such a unit finding (Bd. Br. below, p. 15).

(c) The Decision of the Court of Appeals

In affirming the judgment of the District Court, the Court of Appeals in an opinion written by Judge Bazelon rejected the Board's contention that its determinations in representation proceedings are reviewable only in the Court of Appeals and then only when they have become the basis for a final order in an unfair labor practice under Section 10. In that Court, as it does here, the Board contended that its position was sustained by *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). The Court, however, held that the *Switchmen's* case was applicable only to such determinations as depended upon the Board's "expertise and discretion". It distinguished such cases from situations where the Board had violated an express statutory requirement—in this instance the provision in 9(b)(1)

—which expressly forbade the inclusion of professional and non-professional employees in the same unit, and where injury had occurred as a result of the Board's violation of the statute.

The Court held that in such cases the District Court had jurisdiction to grant relief, irrespective of whether or not the party injured might eventually have obtained a remedy under Section 10. The Court did note, however, that the possibility of relief under Section 10 was much too "remote and conjectural" to provide "an adequate remedy".

INTEREST OF ENGINEERS JOINT COUNCIL

The Engineers Joint Council has filed this brief because the issue involved is a matter of major concern to the entire engineering profession. The Council is an unincorporated association with offices in New York City, organized in 1945. It is in essence a federation of 14 engineering societies having an aggregate membership of more than 200,000, and represents the principal branches of the engineering profession in the United States.

This is only one of a series of cases involving the certification of engineering groups, in which the Board has disregarded those provisions of the Taft-Hartley Act insuring a separate ballot to professional employees.[2] It is estimated today that more than one-half of the 400,000 civilian engineers in the United States are employees of industrial corporations which are covered by the Act. Unless the District Courts have jurisdiction to restrain the Board from dilut-

[2] On p. 37 of the Board's brief, a number of these erroneous decisions are collected in a footnote.

ing the professional character of engineering bargaining units, direct judicial relief to the professional employees affected adversely thereby, is not available.

In the Wagner Act there were no safeguards against the inclusion of professional engineers in bargaining units of clerical, production or maintenance employees. This defect in the Wagner Act had long been a source of dissatisfaction in professional engineering circles. In 1947, it was largely upon the recommendation of a panel of national engineering societies, affiliated with the Council, that Congress included in the amendments to the Taft-Hartley Act the language of the first proviso in Section 9(b) and a definition of the term "professional employee" which appears in the present Act as Section 2(12), and reads as follows:

> "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the results accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> "(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a),

and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

At the time these proposals were made to Congress, E. Lawrence Chandler, appearing for the engineering societies before the Senate Committee on Labor and Public Welfare pointed out that because of technological developments most major industrial corporations had found it necessary to employ large staffs of professional engineers on a full-time basis (Hearings on S. 55, 80th Cong., p. 1704).

Mr. Chandler in his testimony also stated:

"To attempt application of the same standard of measurement for services of professional men and nonprofessional men is not in the public interest. The output of professional employees cannot be standardized as can that of manual and skilled labor. It cannot be measured in terms such as the number of brick a man should lay in a given number of hours, the number of cubic yards of dirt that should be moved, the square yards of painting, the amount of type to be set, bolts to be placed, feet of conduit to be laid, or in terms of any other similar unit.

* * * * * * * * *

"The background, education, training, and work interests of professional employees and nonprofessional employees are inherently divergent. It is futile to expect that a forced grouping of the professional and nonprofessional employees in any plant or organization could possibly form an 'appropriate bargaining unit'. Under present law and its administration, such plainly inappropriate groupings are made and, by fiat, are declared appropriate. We do not consider this to have been the intent of Congress.

"Some groups of professional employees have been recognized as appropriate bargaining units under existing laws, but usually such recognition has been accomplished only after long and costly controversy, entailing litigation and appeal and fundamental disturbance of employer-employee relationships. Frequently, however, professional employees have been grouped arbitrarily in heterogeneous bargaining units. In such cases the professional employees are usually a small minority in a large bargaining unit or trade union local, the majority of whose members have no community of thought or interest with professional employees. We believe that the law should be made so clear and explicit with regard to this matter as to eliminate the possibility of such groupings.

"Consideration by your committee is directed to three specific points which we believe are of fundamental importance for inclusion in any legislation which establishes standards for collective bargaining between employees and employer.

"(1) Any group of professional employees, who have a community of interest and who wish to bargain collectively, should be guaranteed the right to form and administer their own bargaining unit and be permitted free choice of their representatives to negotiate with their employer.

"(2) No professional employee, or group of professional employees, desiring to undertake collective bargaining with an employer, should be forced to affiliate with, or become members of, any bargaining group which includes nonprofessional employees, or to submit to representation by such a heterogeneous group or its designated agents.'"[3] (*Id.* p. 1705-06)

* * * * * * * *

[3] Mr. Chandler's third recommendation is irrelevant as it was not embodied in the bill which Congress ultimately enacted.

It was primarily on the basis of this testimony that Congress wrote into the Taft-Hartley Act the provisions in Sections 2 and 9 relating to professional employees.

SUMMARY OF ARGUMENT

Stripped of unessentials, the proposition which the Board is urging this Court to adopt is that the courts of the United States provide no judicial remedy for persons aggrieved by unit determinations which disregard an express provision of the Act. On its face, this proposition is not an appealing one. In recent years this Court, notwithstanding the absence of statutory provisions for judicial review, has repeatedly upheld the jurisdiction of district courts to grant relief to persons injured by administrative action.[4]

Without addressing itself directly to the general principle of the duty of the courts to provide redress against illegal and arbitrary actions of administrative agencies, the Board contends that any determination made in the course of a representation proceeding should be immune from judicial review. Its position is that while Section 10(e) and (f) of the Act do provide for judicial review in the courts of appeal, such review is limited to final orders of the Board in unfair labor practice proceedings. Consequently it urges that a certification of a union representative, not being a final order, is unreviewable. The legislative history

---

[4] *Harmon* v. *Brucker*, — U.S. —, decided March 3, 1958, 26 LW 4166-67; *Peters* v. *Hobby*, 349 U.S. 331; *Service* v. *Dulles*, 354 U.S. 363; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; and see also, *Leedom* v. *International Mine, Mill & Smelter Workers*, 352 U.S. 145; *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36, *cert. den.*, 347 U.S. 943.

of the Act and the decision of this Court in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, are cited in support of this view. The Board also defends the determination, drawn into issue in this suit, as having a "rational basis", and hence should not be regarded as "wholly arbitrary agency action".

We submit that this argument is framed so as to blur the distinction between judicial review of the exercise of administrative discretion and the jurisdiction of the courts not only to set aside administrative action undertaken in plain disregard of a statutory limitation, but also to compel the agency to conform to the statute.[5]

Contrary to the Board's suggestion, what is involved here is a clear refusal of the Board to perform its functions in representation cases pertaining to professional personnel in accordance with the statute. The argument that the Board's treatment of the unit question was not "arbitrary" should not be entertained by this Court, as the District Court's finding to the contrary was not contested on appeal, and consequently the court below had no opportunity to pass on the question. Moreover, as we shall point out, the inclusion

---

[5] Under the decree of the District Court the Board has been ordered to vacate the certification and to entertain and act upon the petition pursuant to the provisions of Section 9(c)(1). Insofar as relevant, Section 9(c) provides that "Whenever a petition shall have been filed . . . by . . . [a] labor organization . . . alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a) . . . the Board shall investigate such petition, and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . ."

of non-professional employees in the same bargaining unit with professional employees was expressly prohibited by the Act.

Under these circumstances, we submit that petitioners' objections to the decision of the court below are completely lacking in merit because (a) the immunity of representation proceedings from judicial scrutiny has no application to determinations which depart from statutory requirements; (b) neither the language nor legislative history of the Act precludes judicial relief where review provided by Section 10 is inadequate; and (c) such statutory provisions for review as the Act contains provide no adequate relief for labor organizations aggrieved by the kind of determination made in the instant case.

ARGUMENT

I. THE UNIT FINDING OF THE BOARD EXPRESSLY DEPARTED FROM THE REQUIREMENTS OF THE STATUTE.

As we have previously pointed out, the Board did not contest in the court of appeals the following finding of the district court (R. 30):

> "2. The defendants found that professional and non-professional employees together comprise a unit appropriate for purposes of collective bargaining without first conducting a separate election among the professional employees to determine whether a majority of them favor inclusion within a unit with non-professional employees. Section 9 (b) (1) of the Act states explicitly that "the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. . ." (emphasis added). The Board has no

> statutory warrant to disregard this mandatory limitation upon its authority because in its view the commingling of professional and non-professional employees would not "destroy the predominantly professional character of such a unit," without conducting the requisite election in which a majority of such professional employees vote for inclusion in such unit. The refusal of defendants to conduct the required election works irreparable harm to the statutory right that an appropriate unit for collective bargaining purposes shall include only professional employees unless a majority of them vote for the inclusion of non-professional employees within the unit."

It is therefore somewhat surprising to find the Board in its brief, although disclaiming any such intention (Br. 34), advancing to this Court the very argument it made on the merits in the District Court.[6] Our position is that this portion of the Board's brief should be completely disregarded. It is obviously intended to detract from the force of the conclusion of the Court of Appeals that "this case presents Board violation of a statutory requirement and resulting injury", *Leedom* v. *Kyne*, 249 F. 2d 490, 491. If the Board had any doubt that this was precisely the situation which confronted the court below, it should have addressed its contention on rationality to the judges of that tribunal. In any event, the argument on this point merely discloses that the Board's departure from the statute was rational in the sense that it was deliberate rather than accidental.

---

[6] Purporting not to argue the merits, the Board's excuse for including this argument is that it wished to show that its interpretation of Section 9(b)(1) had a "rational" basis.

An examination of the disputed Decision and Direction of Election (R. 16) reveals that the Board expressly found nine of the employees it included, were not professional employees within the meaning of Section 2(12) of the Act. The reason assigned for their inclusion was (a) they shared a close community of interest with the professional employees, and (b) these employees were included in the same unit under a 1946 Direction of Election at this very plant.

It is difficult to understand why the Board attached any importance to a unit finding in 1946, establishing a mixed unit of professionals and non-professionals. That finding was made one year before the Taft-Hartley amendments. Presumably it was this type of unit which the witness Chandler had in mind when he said:

> "It is futile to expect that a forced grouping of the professional and nonprofessional employees in any plant or organization could possibly form 'an appropriate unit' ".

Although the Board cited no precedent for including professional and nonprofessional personnel in the same unit, other than the earlier *Westinghouse* case, this is not the first time since the effective date of the amended Act that the Board has disregarded the literal language of Section 9(b)(1).

Shortly after the passage of the amended Act the Board directed an election in a unit composed of 81 professional engineers and nine other employees who were admittedly non-professionals. In that case (*Continental Motors Corp.*, 77 NLRB 345), as in this one, the percentage of non-professionals was relatively

small and the Board subsequently defended its decision on that ground.[1]

The *Continental Motors* case was not challenged in the courts. As a result of this assertion of discretion the Board proceeded in other representation cases thereafter to place much larger numbers of nonprofessionals in the unit, e.g., *Boeing Airplane Co.*, 86 NLRB 368 (26%); *Schwartz Laboratories, Inc.*, 89 NLRB 930 (29.1%); *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395 (31½%).

The Board in its brief contends that the legislative history of the proviso to Section 9(b)(1) shows the propriety of including nonprofessional employees in a bargaining unit as long as such unit is predominantly professional. This argument is based on (1) some excerpts taken out of context from the House and Senate Reports on the bill, and (2) asserted Congressional ratification of this line of decisions.

It is a well settled principle of statutory construction, however that where the language of an Act is plain, the court should not inquire into the legislative history. *Bate Refrigerator Co.* v. *Salzberger*, 157 U.S. 1; *Red Canyon Sheet Co.* v. *Ickes*, 98 F. 2d 308 (CADC). It is apparent that the language forbidding the inclusion of professionals with nonprofessionals is crystal clear. Consequently it is unnecessary to review the hearings, committee reports or the floor debate to ascertain the meaning which Congress intended. But in any event, we submit that the legislative history,

---

[1] Testimony of Chairman Herzog before Joint Committee on Labor-Management Relations (Hearings, pp. 1147-1148). In referring to this decision Mr. Herzog said: "I am not perfectly sure that the decision was 100% good law".

fragmentary as it is, affords no basis for the contention that Congress did not intend a flat prohibition of any heterogeneous bargaining units.

The cited testimony of the witness Chandler reveals that the engineering societies proposed the present language of the Act, not merely because professional employees could be out-voted by other employees if placed in a general bargaining unit, but also on the ground that "the background, education, training and work interests of professional employees and nonprofessional employees" are so "inherently divergent" that "a forced grouping" cannot "possibly form an appropriate bargaining unit".

If all that Congress had been concerned with was the possibility that a nonprofessional majority could outvote a professional minority, it would have been simple to have stated the proviso in Section 9(b)(1) as a limitation upon the Board's power to lump professionals and nonprofessionals together unless the former constituted a majority of the proposed unit. This is not what Congress did, yet the Board has acted as if Congress had formulated such language.

It is true that the committee reports respecting Section 9(b)(1) do advert to the need for giving professional employees protection against having their freedom of choice overridden by larger occupational groups but none of these reports suggests in any way that this was all that the proposed amendment would accomplish. The Senate Report, for example, accordingly describes Section 9(b)(1) as follows:

> "The several amendments to this subsection propose to limit the Board's *discretion* in determining the kind of unit appropriate for collective bargain-

ing: (1) the Board is *prohibited* from including professional employees in units with other employees unless they first vote in favor of such inclusion". (S. Rept. No. 15, I. Legislative History, Labor-Management Relations Act, 1947, GPO, p. 431). [Emphasis supplied]

Moreover, the Board defense of its current practices also overlooks the fact that even the inclusion of a relatively small number of nonprofessionals in a "predominantly professional unit" carries with it the very real danger that if the professionals are closely divided the votes of the nonprofessionals might well result in an election not reflecting the will of the majority of the professional group.

The post-legislative history to which the Board points has even less significance. The fact that the Joint Committee did not recommend overruling the *Continental Motors* doctrine cannot be construed as Congressional approval, for Congress never acted upon even the recommendations made by the Joint Committee. In fact since 1947, Congress has never undertaken any comprehensive revision of the National Labor Relations Act.[8]

---

[8] The Board offers the novel suggestion (Br. 23, n. 13) that a union aggrieved by a Board determination has a remedy even though it is denied access to the courts, viz., corrective action by Congress. It is difficult to believe that this argument was seriously advanced. Under its logic it would seem unnecessary for the courts ever to concern themselves with questions of statutory construction by administrative agencies because Congress in theory can always enact legislation overruling them. It should also be noted that the Joint Committee on Labor-Management Relations, to which the brief refers as a method of facilitating "legislative oversight" went out of existence on January 2, 1949 under the terms of the Title creating it (Sec. 403, Labor-Management Relations Act, 1947, 29 U.S.C. 1946 Ed. Supp. 5, 191).

2. AGENCY ACTION IN VIOLATION OF STATUTE CONFERS JURISDICTION ON DISTRICT COURTS.

(a) Representation Proceedings Are Immune From Judicial Scrutiny Only Where Challenge to Agency Is Directed to Issues in Which Agency Is Vested With Discretion.

The Board's main thesis is that the failure of Congress to provide expressly for judicial review of certifications discloses an intention to preclude review of representation determinations under any circumstances. It asserts that *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 97, is dispositive of this issue.

But the *Switchmen's* case is no authority for the proposition that where the Board clearly departs from statutory requirements in representation proceedings, the district courts are without power to restrain it. In the *Switchmen's* case the union which brought the action did not contend that the Mediation Board had disregarded any plain statutory limitation upon its powers. It seems appropriate at this point to describe the precise issue the plaintiff in that case raised.

Under subdivision 9 of Section 2 of the Railway Labor Act (U.S.C.A. Title 45 § 152) the Board had certified after a systemwide election in the New York Central Railroad, the Brotherhood of Railroad Trainmen as the representative for all the yardmen. The Switchmen contended that in certain divisions of the system, separate votes should have been taken of the yardmen. [Presumably had the Mediation Board conducted an election in divisional units rather than in a system unit, the plaintiff union might have obtained a majority in some divisions.] The object of the action was cancellation of the certificate to the rival labor organization.

In holding that Congress intended certifications under the Railway Labor Act to be unreviewable, the court did attach some weight to the absence in the statute of any express provisions for judicial review with respect to certifications. It did not regard this feature of the Railway Labor Act as conclusive, however, for it said:

> "Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may nonetheless be supplied". (Id., 320 U.S. 301)

The court then noted that the authority conferred by Congress upon the Mediation Board in election disputes was to interpret the meaning of the terms "craft" or "class". Id., 320 U.S. 305. As neither term was defined in the statute, it is therefore obvious that what the Switchmen's Union was assailing was an exercise of judgment rather than a departure from the letter of the statute.

The Board argues that the Switchmen's case is "precisely in point" because there is an analogous statutory scheme in its own Act. It may be conceded that the opening sentence in Section 9(b) of the Labor Relations Act which grants wide discretion to the Board in deciding whether employer units, plant units, craft units or subdivisions thereof, are appropriate, does indeed bear a close resemblance to the section in the Railway Labor Act authorizing another administrative agency to certify the representatives of the craft or class involved in a representation dispute—the very section drawn into issue in the *Switchmen's* case.

In both situations Congress has given the respective administrative agencies wide latitude for judgment in

the certification of bargaining units. Consequently even where judicial review is authorized, the courts have been reluctant to substitute their judgment for that of the administrative agency. *Mueller Brass Co.* v. *N.L.R.B.*, 86 U.S. App. D.C. 153, 180 F. 2d 402. Thus, to quote from the Supreme Court in the *Switchmen's* case, "the type of problem inolved" was evidence that the discretionary powers of the Board were not intended to be the subject of judicial review.

But the analogy between Section 9(b) and the corresponding language of the Railway Labor Act completely breaks down when it is carried into the various provisos to Section 9(b), enumerating the areas in which Congress deprived the Board of agency discretion. Obviously if the Railway Labor Act had expressly declared that certifications could be made only in separate divisions of a railroad system the "type of problem" the court had before it in the *Switchmen's* case would have been entirely different, for it is the traditional function of a reviewing court to see to it that administrative authority is exercised within express statutory limitations.

Simlarly, we are not concerned here with any question of interpretation or exercise of discretion by the Board. The first proviso to Section 9(b) makes it plain that the Board may not decide that any unit is appropriate if it includes both professional and nonprofessional employees "unless a majority of such professional employees vote for inclusion in such unit". There is nothing in the Act to indicate, nor is it reasonable to infer that Congress intended to grant to the Board, power to repeal an express provision of the Act and thus relieve itself of the affirmative duty imposed upon it by Section 9(b)(1).

The distinction between agency construction of a statute and agency discretion is not a novel one. Congress itself adverted to this distinction in Section 10 of the Administrative Procedure Act (5 U.S.C. § 109). This section confers a right of judicial review to any person suffering legal wrong because of any agency action "except so far as . . . agency action is by law *committed to agency discretion*". [Emphasis supplied.]

(b) Congress Did Not Intend to Preclude Judicial Relief Where Review Provided by Section 10 Was Inadequate.

The Board bolsters this argument by reference to the legislative history of both the original and amended Acts. Its reading of this history, however, is undiscriminating because it fails to take into account the context of judicial decisions in which Congress in 1947 amended the original act. It calls attenton to the decision of this Court in *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401, 409-11, where reference was made to the Senate committee's explanation of the limited provision for review of representation cases in Section 9(d) of the Wagner Act. All that the Court held in that case, however, was that Sections 10(e) and (f) limited review in the courts of appeal to unfair labor practice orders. The court expressly left open the question of whether a union aggrieved by Board action in a representation case might have recourse to the district courts.

Earlier the Court had indeed held that employers could not obtain injunctive relief in the district courts against proceedings by the Board, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. The reason assigned was:

"Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the circuit court of appeals".

This doctrine was developed by the courts of the District of Columbia circuits so as to bar employers from access to the district courts to challenge a certification. In *Norris, Inc.* v. *N.L.R.B.*, 85 U.S. App. D.C. 106, 177 F. 2d 26, it was pointed out that all that an employer, assertedly aggrieved by a certification had to do, was to ignore the certification and let the union file a refusal to bargain charge. Under such circumstances the employer could not be compelled to bargain with the certified union until he was afforded a hearing before the Board and judicial review in a court of appeals under either Section 10(e) or 10(f) of the Act.

The courts recognized, however, that this avenue of attacking a certification collaterally in an unfair labor practice proceeding was not available to unions under the Wagner Act, as unfair labor practices could be committed only by employers. Undoubtedly it was this consideration which caused this Court in the *American Federation of Labor* case to reserve the question of district court jurisdiction over certain representation issues.

In 1945, despite the intervening *Switchmen's Union* case, this Court again adverted to the question left open in the *American Federation of Labor* opinion, *Inland Empire Dist. Council* v. *Millis*, 325 U.S. 697. In this case a carpenters local challenged the procedure in a representation case which had resulted in the election and certification of a rival union, on the ground

that the only hearing accorded it by the Board occurred after the election was held.

If the Board were correct in its thesis that the *Switchmen's* case stood for the proposition that all judicial review of certifications was precluded, the Court might well have dismissed this petition in a *per curiam* order. The Court, however, noting that the courts of appeal of the various circuits were divided, 325 U.S. 697-700, n. 1, on the issue of jurisdiction, remarked upon the obvious importance of the question and went on to restate its previously announced view that the question of whether the Wagner Act precluded judicial review of a certification under Section 9(c) in an independent suit brought under Section 24 of the Judicial Code, could be "appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy".

The Court then proceeded to consider the merits of the case and reached the conclusion that a post-election hearing satisfied the statutory requirements and hence there had been no showing of unlawful action by the Board.

It was against this background that the Taft-Hartley Act was written in 1947. The Board professes to find in the rejection by the conferees of a provision in the House bill making certifications subject to judicial review, a clear Congressional intent to deprive district courts of jurisdiction to consider any aspect of a representation case. A more discriminating examination of the rejected amendment, however, and Senator Taft's subsequent explanation, show that there is no foundation for so broad an inference.

The House bill had amended Section 10(f) of the Act so as to put certifications and final unfair labor practice orders of the Board on the same footing so far as petitions for review were concerned. Had the amendment been accepted it would have meant that the courts of appeal of the various circuits would have been under a duty to decide not only whether certifications departed from statutory requirements but also whether the underlying findings on which the certification was based, were supported by substantial evidence. Undoubtedly such broad review in representation cases could have led to "dilatory tactics". This was the specific problem that Senator Taft was concerned with in the statement quoted in petitioners' brief (pp. 21-22).

There is nothing to suggest, however, that in formulating the Taft-Hartley Act Congress intended to deprive litigants of any rights recognized by the courts under the Wagner Act, to obtain relief against illegal representation determinations in the district courts. In other words, Congress did nothing to settle the conflict of authority in the different circuits which had caused this Court to grant certiorari in *Inland Empire*.[9] Thus, the action of the conferees in rejecting the House amendment does not possess the significance the Board would now attach to it.

---

[9] No assumption can be made that Congress was unaware of the *Inland Empire* case, as it specifically amended Section 9 so as to require the Board to hold hearings prior to elections rather than after them. See Sen. Taft's summary of Conference Report, 93 Cong. Rec. 6601; II Legis. Hist. 1542. See also, 93 Cong. Rec. 664; II Legis. Hist. 158203. In sum, Congress was at pains to amend the statute so as to obviate the construction placed on Section 9 by this Court, but let stand the Court's observations on district court jurisdiction.

The Board also relies upon Congressional inclusion in the 1947 amendments of Sections 10(1) and 10(j) which empower the district courts to grant temporary injunctive relief against certain kinds of unfair labor practices. It is argued that the inference should be drawn, so far as the Labor Relations Act is concerned, that Congress intended to limit the role of the district courts to these particular subsections. But there is no basis for any such inference.

Prior to the Taft-Hartley Act Congress had already passed Section 24 of the Judicial Code, now 28 U.S.C. § 1337, and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009. The jurisdiction of the district courts to grant relief here depends upon these provisions. A subsequent grant of power to the district courts to exercise ancillary functions in connection with the Act, can scarcely be construed as an implied repeal of preexisting jurisdiction.

(c) Such Review as Section 10 Provides Would Afford No Relief to Respondent.

Although the cases denying district courts jurisdiction to review representation determinations have generally turned on the adequacy of statutory judicial review under Sections 10(e) and (f) of the Act, *Myers* v. *Bethlehem Shipbuilding Corp., supra; Norris, Inc.* v. *N.L.R.B., supra,* the Board is contending that even though the Court should hold that this method of obtaining review would not be open to respondent here or to other employees or unions similarly situated, the district courts should not be permitted to fill this vacuum. As the Board in a footnote does suggest, however, that there is a method by which the union here

could obtain review of the certification, it seems appropriate to analyze this facet of its position.

According to the Board, Section 8(b)(3) which makes it an unfair labor practice for a certified union to refuse to bargain, creates a device under which a labor organization, like an employer, can test the validity of a certification unilaterally by declining to bargain. Under this ingenious scheme the certified union could refuse to bargain with Westinghouse except on the basis of representing only the professional employees. Since this would be tantamount to refusal to bargain in the unit found appropriate, the union then would be vulnerable to a charge of violating Section 8(b)(3). If a complaint were issued on this basis, the Board could then frame an unfair labor practice order requiring the union to bargain with all the employees in the certified unit. In this posture of the case the union could file a petition for review under Section 10(f) of the Act, and thus obtain circuit court scrutiny of the certification.

In the court below, where petitioner made a full dress argument on this point, the court found that the possibility of such a remedy was inadequate as the employer, not being aggrieved by the Board's inclusion of the non-professional employees, would have no motive for filing a charge, as he would then be free to deal with the employees individually.

The Court also thought it "remote" that any of the nine non-professionals would file unfair labor practice charges as they were "hardly likely to insist upon placing their faith in the hands of a reluctant bargaining representative". The authors of the Board's brief state that they believe "the court's assumption is un-

warranted, particularly insofar as the filing of charges by the nine non-professionals is concerned".

We submit that the observations of the court were well taken. The record of the representation proceedings shows that it was the competing union which took the position at the hearing that the employees in the non-professional categories should be included (R. 13). Presumably, these employees were adherents of the rival union and thus would have little or no reason to attempt to force respondent union to represent them.

Moreover, as the court pointed out, Westinghouse would have no motive for filing a charge. Yet, in order to perfect their charge the non-professional employees would need the collaboration of Westinghouse, because, as this Court has held, there is no duty to bargain except upon the request of the opposite party. *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292.

Since the Taft-Hartley Act, this Court has already sustained a district court injunction preventing the Board from departing from statutory requirements in representation proceedings, *Leedom* v. *International Mine, Mill & Smelter Workers*, 352 U.S. 15. The Board argues now that this case should not be considered a precedent because jurisdictional arguments were not made in this Court, although the issue of lack of jurisdiction had been raised below. This contention reveals an odd approach to litigation policy. If the Board's position in this case is upheld, it would appear that despite the *Mine, Mill & Smelter Workers* case,[16] there would be no ju-

[16] See also, *International Maritime Union* v. *Herzog*, 334 U.S. 854.

dicial obstacle in the future to the Board's adopting whatever construction it pleased with respect to the filing requirements of the Act embodied in Sections 9(f)(g) and (h) insofar as they refer to representation cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals be affirmed.

ENGINEERS JOINT COUNCIL

By its Attorneys

GERARD D. REILLY
JOSEPH C. WELLS

Of Counsel

REILLY, WELLS & RHODES
1120 Tower Building
Washington 5, D. C.

May, 1958